No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE COMMERCIAL LAW LEAGUE OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Commercial Law League of America (CLLA), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance and actively engaged in the field of commercial law, bankruptcy and reorganization. The League's membership, which numbers over 1,000 professionals, includes attorneys from large and small firms and bankruptcy judges in virtually every state and consists of representatives of divergent interests in bankruptcy cases. The CLLA has been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

The ruling underlying this appeal correctly refused to expose the attorney and law firm members of the *Amicus*, and many clients of those members, to individual and class action claims under the FDCPA. The *Amicus* has a direct interest in this litigation. The organization has authorized the filing of this brief

SUMMARY OF ARGUMENT

In *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 533 (1994), this Court announced a rule of statutory

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1. As provided for in U.S. SUP. CT R 37(6) the *Amicus* states that: .(a) no party's counsel authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (c) no person—other than the *Amicus Curiae*, its members, and its counsel—contributed money to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

construction that absent an explicit legislative command, federal statutes should not intrude upon matters of traditional state concern. Like this case, *BFP* involved mortgage foreclosures under state law. In *BFP*, the Court found that the term "reasonably equivalent value" in the Bankruptcy Code should not be interpreted in a manner that would upset non-collusive foreclosure sales under state law. In this case, the *Amicus* submits that the terms "debt collector" and "debt collection" should not be interpreted to add additional burden to non-judicial foreclosure actions under state law without an explicit mandate which is absent here. The Tenth Circuit's construction of the term "debt collector" keeps the Fair Debt Collection Practices Act from pre-empting applicable state law in areas traditionally reserved to the States and thus fulfills an important role in our federal system.

ARGUMENT

INTRODUCTION

This case concerns whether the FDCPA applies to a non-judicial foreclosure sale in Colorado. Respondent McCarthy & Holthus sent Petitioner Obduskey a notice initiating a foreclosure. Obduskey wrote back disputing the debt. Obduskey claimed that McCarthy & Holthus continued to proceed with the foreclosure without verifying the debt, which would have been required if the FDCPA applied. Obduskey filed an FDCPA action against both Wells Fargo, the loan servicer, and McCarthy & Holthus, the law firm. The District Court dismissed the suit, finding that "foreclosure proceedings are not a collection of a debt." *Obduskey v. Wells Fargo*, 2016 U.S. Dist. LEXIS 103281 (D. Col. 2016) at *9. The Tenth Circuit

affirmed, holding that "the FDCPA does not apply to non-judicial foreclosure proceedings in Colorado." *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1219 (10th Cir. 2018).

The Commercial Law League of America believes that the lower courts were correct. It submits this *amicus* brief to highlight a single point: that this Court's precedent in *BFP v. Resolution Trust Corporation* provides an important guide for interpreting the FDCPA in a manner which will not interfere with non-judicial foreclosure proceedings established under state law. If the Court has a choice between an interpretation of the FDCPA which burdens state law foreclosure remedies or one which does not, it should choose the latter. To use the vernacular, the federal government should stay in its lane when there is a strong state interest and a weak federal purpose.

In *BFP v. Resolution Trust Corporation*, this Court held that "the consideration received from a non-collusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law" conclusively satisfied the requirement that a transfer be made in exchange for "reasonably equivalent value" under the Bankruptcy Code.

In making this ruling, the Court interpreted 11 U.S.C. § 548 in a manner which would not interfere with state regulatory systems absent an express federal mandate.

> Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . .When the Federal Government takes over . . . local radiations in the vast

> network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539-540 (1947), quoted in *Kelly v. Robinson*, 479 U.S. 36, 49-50, n. 11, 93 L. Ed. 2d 216, 107 S. Ct. 353 (1986).

Id. at 544. The Court also stated:

> Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation

Id. at 539-40.

This case also involves statutory interpretation, specifically whether the FDCPA's cease communications requirement applies in the context of a non-judicial foreclosure. Just as a silent federal statute did not preempt a compelling state interest in *BFP*, the same result should apply in this case. The FDCPA does not explicitly apply to non-judicial foreclosures. As in *BFP*, the state interest in crafting and protecting its own system of property should prevail over an ambiguous provision in a federal statute.

I. States Have a Substantial Interest in Regulating Non-Judicial Foreclosures and the Practice of Law

As this Court recognized in *BFP*, states have a substantial interest in regulating mortgage foreclosure procedures. Justice Scalia wrote that:

> It is beyond question that an essential state interest is at issue here: We have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government."

BFP, at 544. The methods by which states allow title to pass in a real estate foreclosure reflect their individual policy choices and vary widely from state to state. Colorado utilizes a public trustee to conduct foreclosure sales. See Brief of Respondent', p. 5. Texas follows a dual-track system. Generally, foreclosure sales may be conducted by a private trustee on the first Tuesday of the month provided that the borrower receives 21 days' advance notice. Tex. Prop. Code §51.002. However, before a home equity loan may be foreclosed, there must be a court order entered authorizing the foreclosure followed by the usual procedure. Tex. Const. Art. XVI, § 50(a)(6) and TEX.R.CIV.P. 736.

Compared to the relatively simple procedures followed by Texas, Minnesota has a much more elaborate system. In Minnesota, a person wishing to foreclose must file a notice of pendency with the county recorder or registrar of titles prior to the sale being advertised but not more than six months before the first notice of publication. Minn.

Stat. Ann. § 580.032(3). This is followed by publication in a qualified newspaper for six weeks. The foreclosing party must also serve notice of foreclosure sale on the person in possession of the property in the same manner as a summons at least four weeks prior to the foreclosure. Minn. Stat. Ann. §580.03. A foreclosure may be postponed for either five months or eleven months by filing an affidavit, although postponement reduces the period for equity of redemption. Minn. Stat. Ann. §580.07. See also *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53 (Minn. 2013).

Other states, such as Ohio, do not allow non-judicial foreclosures at all. Ohio Rev. Code Ann. § 2323.07. *Wells Fargo Bank, N.A. v. Young*, 2011 Ohio App. LEXIS 102 (Ohio App. 2nd Dist. 2011).

Laying the requirements of the FDCPA on top of the requirements of state law would alter the policy determinations of the state legislatures as to whether foreclosure should be swift (as in Texas) or prolonged (as in Minnesota). As explained by Respondent in their brief, the cease collection requirement of 15 U.S.C. § 1692g(b) would preclude giving the notices required by Colorado law until the debt has been verified. The non-judicial remedy would become a remedy virtually always litigated (and often in federal court), which would undermine the less costly, non-judicial foreclosure scheme created by the States.

In this case, one of the parties being sued under the FDCPA was the law firm which initiated the non-judicial foreclosure. States have a strong interest in regulating attorneys licensed to practice in their jurisdictions. The practice of law has long been held to high standards.

Courts may prescribe standards for admission to the bar and prevent the unauthorized practice of law by the lay public. *Leis v. Flynt*, 439 U.S. 438 (1979).

Courts also promulgate codes of professional conduct for attorneys. The Colorado Supreme Court has adopted the Colorado Rules of Professional Conduct. These rules establish duties in dealing with third parties, even outside of a judicial proceeding. A Colorado attorney is not allowed to knowingly "make a false statement of material fact or law to a third person." Colorado Rules of Professional Conduct 4.1(a). When dealing with a person who is not represented by counsel, a Colorado attorney may not "state or imply that the lawyer is disinterested" and "shall not give legal advice to an unrepresented person, other than the advice to secure counsel." Colorado Rules of Professional Conduct 4.3. Violation of these rules can lead to discipline of the attorney involved.

Just as states have a strong interest in regulating foreclosure sales, they also have a strong interest in regulating attorneys. This is another reason to take a narrow interpretation of whether the FDCPA applies to attorneys conducting non-judicial foreclosure sales. Specifically, states can be expected to regulate the attorneys practicing in their jurisdictions and avoid the abuses the FDCPA was intended to prevent. While the Court has previously ruled that the FDCPA applies to attorneys engaging in debt collection generally, *Heintz v. Jenkins*, 514 U.S. 291 (1995), the Court should consider the ability of states to regulate attorneys in deciding what constitutes debt collection.

II. The FDCPA Does Not Explicitly Apply to Non-Judicial Foreclosure Remedies

When Congress adopted the FDCPA, it found that "(t)here is abundant evidence of the use of abusive, deceptive, and unfair collection practices by many debt collectors" and that "(e)xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. § 1692 (a) and (b). In adopting the statute, Congress stated that it intended to step in where existing laws and procedures were inadequate or non-existent. While this was the case with regard to debt collection activities in general, it was not the case with non-judicial foreclosure remedies which are governed by an established and detailed set of state laws.

The statute regulates "debt collectors" who are defined as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). A "debt" is an "obligation or alleged obligation of a consumer to pay money." 15 U.S.C. § 1692a(5).

The text of the FDCPA does not establish the requisite intent to regulate non-judicial foreclosure remedies. As explained by Respondent in their brief, there is a

distinction between seeking to collect money from a consumer on the one hand, which is governed by the FDCPA, and enforcing a lien against real property.

There are two provisions of the FDCPA which refer to actions taken to enforce security interests or liens. Section 1692i(a)(1) states that venue of an action brought to "enforce an interest in real property securing the consumer's obligation" must be brought in the judicial district where the real property is located. This provision applies to judicial proceedings and is not applicable to non-judicial foreclosure remedies. Section 1692f(6) provides that it is an unfair practice for a "debt collector" to take or threaten to take a non-judicial action to "effect dispossession or disablement of property" when there is not a present right to take possession of the property, there is no intent to take possession or the property is exempt by law from being seized. This subsection expands the definition of who is a debt collector but only for the limited purpose of §1692f(6), a provision which is not at issue in this case. These two provisions do not establish the requisite intent to displace state laws and remedies regarding non-judicial foreclosure remedies.

Similarly, the legislative history does not show an intent to apply the FDCPA to non-judicial foreclosure proceedings. As explained by Respondent in their brief, Congress considered two bills, one of which would have applied to "the collection of any debt or the enforcement of security interests." Brief of Respondent, p. 25. Congress did not adopt that bill. Instead, it adopted the more limited language of 15 U.S.C. § 1692f(6) which prohibits misleading actions by debt collectors in connection with security interests. The evidence is that Congress

considered extending the FDCPA to enforcement of security interests, which would have included non-judicial foreclosure remedies, but decided against it.

III. There Is Not a Sufficient Federal Interest to Apply the FDCPA to State Law Non-Judicial Foreclosure Remedies

In *BFP*, this Court narrowly construed the term "reasonably equivalent value" to prevent state law foreclosure procedures from being undermined by a federal law, namely the Bankruptcy Code. Now the Court has another case in which a federal statute could affect state law foreclosure procedures. Once again, states have a strong interest in designing their laws to transfer real estate following a default in a manner consistent with the policy choices of the state. While the interests of federalism should not overrule a clear federal enactment, there is not a clear legislative command under the FDCPA. This Court can and should adopt a construction of the FDCPA which keeps it in its lane, protecting consumers from abusive efforts to collect money. States, on the other hand, should be allowed to make their own judgments about what procedures should be followed in a non-judicial foreclosure remedy. If states believe that a debt verification provision, such as the one contained in 15 U.S.C. § 1692g(b) is desirable in connection with real estate foreclosures, they should be allowed to make that decision and should be allowed to adopt a verification procedure that makes sense in the foreclosure context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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